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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF ELIZABETH STREET GARDEN,

Appellant,

-against-

NO. 60

CITY OF NEW YORK,

Respondent.

-----

20 Eagle Street  
Albany, New York  
May 15, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: First case on our docket is  
2 Number 60, Matter of Elizabeth Street Garden v. The City of  
3 New York.

4 MR. SIEGEL: May it please the court. My name is  
5 Norman Siegel. I'm representing the appellant. I  
6 respectfully request twelve minutes for argument and three  
7 for rebuttal.

8 CHIEF JUDGE WILSON: Yes, sir.

9 MR. SIEGEL: Thank you. This court clearly  
10 stated 30 years ago, In the Matter of Jackson, that the  
11 heart of SEQRA is the Environmental Impact Statement, EIS,  
12 process. Though the proposed action is a type 1, which  
13 carries with the presumption that it is likely to have a  
14 significant adverse impact on the environment and may  
15 require an EIS, no EIS was employed in this case. In the  
16 Friends of P.S. 163, 2017, this court said and I quote,  
17 "Opportunity for public participation and engagement is an  
18 essential and mandatory - - -"

19 JUDGE TROUTMAN: When - - - when there is a  
20 determination of - - - that there's not going to be one  
21 because of a - - - a negative declaration, what is our  
22 review?

23 MR. SIEGEL: To arrive at the determination that  
24 there's no adverse impact on the environment, three things  
25 have to be met by the lead agency here.



1 JUDGE TROUTMAN: But as to our review of their  
2 determination?

3 MR. SIEGEL: I believe it's that you look at  
4 whether or not they participated in identifying the  
5 relevant environmental issues. Two, did they take a hard  
6 look. Although in looking at the cases, for 49 years, it's  
7 very difficult to pinpoint and clarify what hard look says.  
8 And I would hope that this court would consider seriously  
9 in further defining and clarifying what a hard look is.

10 JUDGE RIVERA: Well, what - - - what else do you  
11 think they should have done here? They claim they took a  
12 hard look. He'll make his argument. What do you say is  
13 deficient and that they should have done to meet the  
14 standard?

15 MR. SIEGEL: For example, on public policy the  
16 rule is that you take a look at public policy. Let's take  
17 a look at climate change, a critical issue, especially  
18 these days. So when you take a look at climate change, EAS  
19 fails to even mention, let alone address, the critical  
20 issue of climate change. Nowhere - - - nowhere in the 153-  
21 page EAS does the words climate change appear. Thus, on  
22 that issue alone, not only did they not meet the hard look,  
23 I respectfully submit no look. It's clean. That alone  
24 should have you send it back to the Supreme Court to then  
25 have HPD review.

1 JUDGE CANNATARO: Is it your argument that they  
2 were required to look at every area of concern that's  
3 articulated in the technical manual? Or do they have some  
4 discretion with respect to identifying which areas of  
5 concern they think are appropriate to look at?

6 MR. SIEGEL: This court has said they have  
7 discretion. But then comes the question that I  
8 respectfully ask: how could you not address the issue of  
9 climate change when you're talking about the state  
10 environmental law? And even assuming that there is  
11 discretion, I would submit that discretion is not  
12 unlimited, discretion - - -

13 JUDGE SINGAS: But they then put the greenhouse  
14 emissions. Why isn't that enough?

15 MR. SIEGEL: It's not enough because the  
16 greenhouse emissions they say they look at, we say that you  
17 have to look at things like rising urban heat, nothing.  
18 That's a critical issue. Second, the destruction of trees,  
19 especially mature trees, which we have plenty, two dozen  
20 almost in Elizabeth Street Garden. The trees are there to  
21 reduce the heat and when the storms are coming. And the  
22 training manual talks about the storms and talks about  
23 storm run off. When you have trees and open green grass,  
24 they suck in - - -

25 JUDGE CANNATARO: Counsel?

1 MR. SIEGEL: - - - and therefore - - -

2 JUDGE CANNATARO: I - - - I was intrigued by the  
3 - - -

4 MR. SIEGEL: Thank you.

5 JUDGE CANNATARO: - - - the - - - the tree  
6 argument with climate change that you made. And I went  
7 back and I looked at the technical manual, and it seems  
8 focused, to me, almost exclusively on whether the proposed  
9 building is going to be emitting greenhouse gases. I  
10 didn't see anything in there about whether trees are going  
11 to, I guess, consume greenhouse gases. That doesn't seem  
12 to be a consideration that's even articulated in the  
13 technical manual. Are you saying that that should have,  
14 nonetheless, been - - -

15 MR. SIEGEL: Yes.

16 JUDGE CANNATARO: - - - something that they  
17 considered?

18 MR. SIEGEL: Yes. In a lot of other parts of the  
19 technical manual, they talk about critical change - - -  
20 climate change. And they talk about the difference between  
21 the rising urban heat and the mature trees, in addition to  
22 the fossil fuels. But the trees absorb the carbon dioxide  
23 as well. They store it, and they reduce the heat. And  
24 that's very important. One of the major issues here - - -

25 JUDGE GARCIA: Counsel, I'm sorry to interrupt

1           you. Maybe to put this a different way, this Appellate  
2           Division decision is a couple of pages long and they treat  
3           your - - -

4                       MR. SIEGEL: Disappointing.

5                       JUDGE GARCIA: - - - they treat your greenhouse  
6           emissions and this argument you've been touching. And it  
7           was unanimous. But they granted leave to this court. Do  
8           you have an idea of what the issue of statewide - - - and I  
9           understand the issues are very important to your client and  
10          to this case, but do you have an idea of what the novel  
11          issue - - - as you said, a lot of these cases you were  
12          citing go back a long time, and this may be a disagreement  
13          you have over application of those precedents, but what is  
14          the novel issue here? What's the issue that this court  
15          needs to clarify? Do you think it's this greenhouse gas  
16          emissions?

17                      MR. SIEGEL: No.

18                      JUDGE GARCIA: Climate changes?

19                      MR. SIEGEL: Next year is the fiftieth  
20          anniversary of SEQRA. When we began forty-nine years ago,  
21          people weren't aware of this quintessential threat to  
22          people throughout the state of New York. That's why we  
23          have a State Environmental Quality Review Act. What I  
24          think we have to do is recognize not only the dangers of  
25          climate change, but the importance of the laws to combat

1 the climate change. And what happened here - - -

2 JUDGE GARCIA: Having - - - taking a a point of  
3 the Appellate Division that there really are no standards  
4 or particular things that could be applied, and I think  
5 they do this in a couple of sentences, what would you have  
6 this court say on that issue?

7 MR. SIEGEL: Well, to begin with, when the city  
8 talks about the standards are amorphous in the Appellate  
9 Division, page 40, footnote 7 of their brief is this  
10 report. This report is sixty-three pages. I read it.  
11 Forty city agencies are directed to come up plans,  
12 including the lead agency here, HPD. And they talk about  
13 the open green house. They talk about the fact that the  
14 trees are relevant. The question that - - -

15 JUDGE HALLIGAN: How does - - - how does - - -

16 MR. SIEGEL: - - - you raised before is that that  
17 training manual was written in 2014, ten years ago, very  
18 important. The change - - - I'll give you an example.  
19 Governor Cuomo set up a 21 Century Commission. They looked  
20 at this and they recommended to put back into SEQRA. There  
21 is a standard that you have to look at climate change.

22 JUDGE RIVERA: So - - - so is in - - - so is in  
23 part - - -

24 MR. SIEGEL: The current rule say that.

25 JUDGE RIVERA: So is in part the argument that to

1 the extent they limited their methodology to perhaps a  
2 narrow reading of SEQRA, that that's - - - trying to  
3 respond to Judge Garcia, that that's the novel issue or  
4 that's the issue that we need to make some statement that  
5 climate change is obviously a concern?

6 MR. SIEGEL: Yes. Right, Your Honor. But  
7 second, the other part - - -

8 JUDGE GARCIA: So this court should say that  
9 climate change is obviously a concern and what?

10 MR. SIEGEL: The current regulation says that  
11 they should address climate change. For example - - -

12 JUDGE HALLIGAN: But what does that mean as a  
13 specific matter? And where are there some standards that  
14 can appropriately be implemented in the SEQRA process?  
15 Where do we find that?

16 MR. SIEGEL: 2012 consent decree that the city  
17 had with the State Department of Environmental  
18 Conservation. They set forth benchmarks for 2012 to 2030.

19 JUDGE HALLIGAN: Aren't those broad? In other  
20 words, what - - - how does that translate into the  
21 evaluation of a specific project on a specific site? And  
22 where would you have us find standards to do that?

23 MR. SIEGEL: Executive Orders 26 as well as the  
24 12,000 - - -

25 JUDGE HALLIGAN: But where in 26 are there - - -



1 is there the kind of specificity that can readily be  
2 translated into the SEQRA process?

3 MR. SIEGEL: This report has, in five instances,  
4 where they talk about plans to create open green space.  
5 Why are we destroying - - -

6 JUDGE HALLIGAN: Okay. But - - - but just as a  
7 practical matter, what does that mean? Does that - - -  
8 does that mean that - - - and how would it be waived. Does  
9 that mean that wherever there's any incursion on open space  
10 there should be a finding of a significant impact? I'm  
11 just trying to understand how you would have that - - -  
12 that operationalize.

13 MR. SIEGEL: Good question. I think what you  
14 identify and - - - and analyzed and have community input,  
15 when you're going to destroy 20,000 of open green space,  
16 what does that mean to the people in the community? When  
17 you have a negative - - -

18 JUDGE HALLIGAN: But has - - - hasn't that been  
19 done by way of assessing what the open space impact is?

20 MR. SIEGEL: Has it been done? It wasn't done  
21 here. And the specific answer to your question is that you  
22 don't destroy Elizabeth Street Garden when there could be  
23 reasonable alternatives. When you look at the open spaces  
24 that they have, nothing's comparable. There are walkways  
25 between cars that are coming on both sides. You're talking

1 about paved ball parks and playgrounds.

2 JUDGE HALLIGAN: Okay. But that is something  
3 that they did assess. And I understand you disagree with  
4 the assessment. But that - - - those are points, I think,  
5 that they - - - that they looked at.

6 MR. SIEGEL: But the - - - if you had an EIS, you  
7 would have the community input, who in Merson, your  
8 decision in 1997, says you can't have a bilateral process  
9 between the developer and the lead agency. You need to  
10 have the people in the neighborhood decide whether or not  
11 the existing uses are going to be sufficient if you destroy  
12 this oasis, this open space that reduces the fear of  
13 climate change and has so many other aspects.

14 JUDGE RIVERA: So - - - so is that - - -

15 MR. SIEGEL: The answer to the question - - -

16 JUDGE RIVERA: So is that, at the end of the day,  
17 the issue pitting the need for affordable housing against  
18 the open space?

19 MR. SIEGEL: You can have both.

20 JUDGE RIVERA: Okay.

21 MR. SIEGEL: You want both. I wouldn't be here.  
22 My clients are not NIMBY. We would not be here. I've  
23 devoted my life to affordable housing and senior housing,  
24 but there are alternatives. They didn't discuss the  
25 alternatives. You in - - -

1 CHIEF JUDGE WILSON: So is there - - - is there a  
2 proposed - - -

3 MR. SIEGEL: - - - a couple of cases say - - -

4 CHIEF JUDGE WILSON: - - - is there a proposed  
5 action that is small enough that climate change wouldn't  
6 need to be considered? Let's say it was one tree instead  
7 of twenty trees? Would you still - - -

8 MR. SIEGEL: Is that a hypothetical question?

9 CHIEF JUDGE WILSON: Would you still - - - right.  
10 Exactly.

11 MR. SIEGEL: I'll answer it too. I believe every  
12 vote counts in America, every tree counts. However, we  
13 don't have just one tree. We've got many trees.

14 CHIEF JUDGE WILSON: I'm not sure I understood  
15 the - - -

16 MR. SIEGEL: We have 20,000 square feet.

17 CHIEF JUDGE WILSON: - - - first part of your  
18 answer. If it had just been one tree, would the - - -  
19 would HPD have had the discretion to say we're not even  
20 going to think about climate change because this is just  
21 one tree?

22 MR. SIEGEL: I'd say no. Legally, maybe they  
23 could say that. But that's not the case here. We're  
24 talking about - - - I've looked at all of these places. I  
25 went personally. And you look at these community gardens

1 that they say are alternative, narrow pathways, there's  
2 nothing that you could have, movies, concerts, you can't  
3 have the - - -

4 JUDGE TROUTMAN: So is it your argument that the  
5 error of law here is that they simply didn't do it?

6 MR. SIEGEL: Yes. And also that it's not  
7 rational to conclude that it doesn't have an adverse  
8 impact. And second, that they never took a hard look. I  
9 go back to the question of climate change, no look. In the  
10 153 pages, I was astounded the word climate change doesn't  
11 appear. I understand courts, Supreme Court of United  
12 States, this court, I put you on the same level. You're  
13 looking for something that's clean, that can go back,  
14 create some precedent. And the most important thing for a  
15 court, for lawyers, is to look at the laws that we have,  
16 SEQRA, and show the public the importance of how those laws  
17 can combat these kinds of issues - - -

18 CHIEF JUDGE WILSON: Thank you, Counsel.

19 MR. SIEGEL: - - - how can you not address  
20 climate change?

21 CHIEF JUDGE WILSON: Thank you.

22 MR. SIEGEL: Thank you all very, very much.

23 MR. DAVIES: May it please the court. My name is  
24 Jamison Davies for the respondents. This court should  
25 affirm the First Department's unanimous decision

1 straightforwardly applying well settled law. The  
2 Department of Housing Preservation and Development in this  
3 case did exactly what the law requires, take a hard look at  
4 the potential environmental impacts of the development for  
5 low-income seniors on city-owned property.

6 JUDGE RIVERA: Are you required to look at  
7 climate change, and if so, what's the hard look on that?

8 MR. DAVIES: So two points on that, Your Honor.  
9 First, I think, if you look at the - - - so they bring in  
10 climate change under this generic kind of policy element.  
11 And if you look at the technical manual policy, it's  
12 talking about policies that are particular to that area.  
13 So for example, if you look at 876 of the record where they  
14 do the policy analysis, they talk about this one policy  
15 that does apply to the area, just basically making sure  
16 there's grocery stores - - - sufficient grocery stores.  
17 But I think they did take a look at climate change because  
18 they did do the greenhouse gas analysis.

19 JUDGE RIVERA: I'm sorry. On the - - - just  
20 before you get to that - - -

21 MR. DAVIES: Sure.

22 JUDGE RIVERA: I'm sorry to interrupt you. On  
23 the first part, is it your position that you have to look  
24 at climate change?

25 MR. DAVIES: I think you have - - -

1 JUDGE RIVERA: It's a yes or no?

2 MR. DAVIES: Within the scope of the technical  
3 manual. So I think the greenhouse gas emissions is looking  
4 at climate change. That's the main driver of climate  
5 change, the biggest contributor to climate change. So I  
6 think you do have to do - - -

7 JUDGE CANNATARO: Did that analysis include - - -  
8 consistent with the question I was asking your adversary,  
9 was that a greenhouse gas emission with respect to the  
10 building or was it also a greenhouse gas reduction with  
11 respect to the plant life?

12 MR. DAVIES: It's with respect to the building.  
13 And it just is whether you hit these - - - these threshold  
14 triggers that require further analysis. And so if you  
15 don't hit those threshold triggers whether you do - - -

16 JUDGE CANNATARO: Where do you stand on the  
17 necessity of a greenhouse gas reduction analysis with  
18 respect to plant life?

19 MR. DAVIES: I don't think that the SEQRA process  
20 is so granular. I don't even know if the science is  
21 sufficiently granular to say how much greenhouse gas  
22 reduction you can get from fifteen to twenty trees versus,  
23 you know, a huge forest or something like that. I don't  
24 even know - - -

25 JUDGE RIVERA: But clearly you have to take into

1 consideration open space - - -

2 MR. DAVIES: Yes.

3 JUDGE RIVERA: - - - green open space and other  
4 regular open space. So let's get to that. I mean, I don't  
5 think there's a debate on the climate change analysis by  
6 the scientists that open space is critical to addressing  
7 climate change. So let's just stay with that one.

8 MR. DAVIES: Yes. Correct, Your Honors. And I  
9 think, you know, this is a reduction in open space - - -

10 JUDGE RIVERA: Yes.

11 MR. DAVIES: - - - of about, you know, 14,000  
12 square feet. It's not, in the grand scope of global  
13 climate change, a significant reduction in open space.

14 JUDGE HALLIGAN: But do you think that if the  
15 open space was completely paved as compared with the open  
16 space being totally forested - - - I realize that it's a  
17 little impractical in the middle of the city, but - - - but  
18 would there have to be any accounting for that differential  
19 in terms of its impact?

20 MR. DAVIES: In terms of its impact on climate  
21 change?

22 JUDGE HALLIGAN: On - - - yes. I mean, I  
23 appreciate it would also have some effect, I think, on the  
24 way in which that space is used, but on the climate change  
25 point in particular?

1 MR. DAVIES: I don't think within the scope of  
2 SEQRA. And I think it's important to note that there are a  
3 lot of climate change policies that the city has,  
4 including, for example, the executive order manual.

5 JUDGE HALLIGAN: So what's the interplay between  
6 those executive orders, specifically, and SEQRA and the  
7 technical manual? Does the technical manual need to be  
8 adjusted to account for that? What's your position on  
9 that?

10 MR. DAVIES: So I don't - - - I don't think it  
11 needs to be adjusted to account for that. I think it's  
12 just a matter of, sort of, achieving different aims. SEQRA  
13 is driven towards trying to decide what the net, you know,  
14 sort of marginal impact of a given project is going to be,  
15 whereas the executive order and other policies that the  
16 city is implementing are geared towards a global reduction  
17 in greenhouse gas emission.

18 JUDGE CANNATARO: Counsel pointed out during his  
19 argument that the technical manual in use at the time of  
20 this review was the 2014 technical manual, which I think  
21 now has been updated by 2021 technical manual. Does the  
22 analysis for climate change impacts significantly change  
23 for 2021? I get that you didn't use it, but has there been  
24 an evolution of the thinking on that?

25 MR. DAVIES: I don't think it's significantly



1 different. There may be some minor revisions. I'm not  
2 certain exactly what the revisions are between those two in  
3 the climate change. But I don't think the analysis is  
4 significantly different. It's just - - -

5 JUDGE HALLIGAN: So I guess, here's what I'm  
6 grappling with. It may well be the case, and I don't know  
7 the science, you probably know it better than I do, that  
8 there's no way to gauge, as a scientific matter, what the  
9 impact would be of, let's say, a hundred trees, pick your  
10 number, right, in terms of greenhouse gas emissions. But I  
11 think we could probably agree that adding them would be a  
12 plus in terms of reducing emissions and getting rid of them  
13 would be something that would enhance emission. So is your  
14 view that it doesn't have to be taken into account simply  
15 because you can't calibrate the exact effect or is it  
16 something other than that? Because you could just say,  
17 well, it's a positive thumb on the scale as a general  
18 matter, right?

19 MR. DAVIES: Right. I - - - I think the - - -  
20 our position is that SEQRA is not, I guess, to that level  
21 of granularity. It's to flag potential - - - significant  
22 environmental issues for policymakers when they're making a  
23 decision. I think these kinds of policy questions are  
24 properly in the ULURP process, which is where everyone - -  
25 - you know, which happened here. Everyone had the

1 opportunity to raise these concerns. The council - - - the  
2 city council voted unanimously to approve the project. And  
3 that's really kind of the policy arena where these  
4 questions are better resolved rather than SEQRA, which is a  
5 more technical and procedural statute, which gives you, you  
6 know, the need to basically just flag issues of concern and  
7 determine if they're significant or not.

8 JUDGE CANNATARO: So do you dispute the  
9 contention that public participation is baked into the  
10 SEQRA process?

11 MR. DAVIES: Public participation is baked into  
12 the SEQRA process if you get to the environmental impact  
13 statement. Then the - - - the rules are pretty clear. If  
14 you - - - if you have a negative declaration, there's no  
15 SEQRA public policy - - - public participation elements.  
16 There might be if it's a ULURP action, as it was here. But  
17 if you get to the EIS, then there's opportunities for  
18 public comments. So it matters whether or not you have a  
19 negative declaration or positive declaration, and that's  
20 what - - -

21 JUDGE RIVERA: Let me - - - let me ask you to  
22 turn to the point that the Supreme Court was persuaded by  
23 when it comes to petitioner's argument. This argument that  
24 you all decided that the open space deficiency, which was  
25 acknowledged, right? There's no - - - there's no debate.

1 There's no dispute that the open space is going to decrease  
2 under the project as currently proposed. But you all had  
3 decided that, nevertheless, that - - - that loss of open  
4 space is somehow offset by what otherwise exists or might  
5 be made part of the project. Could you address sort of the  
6 Supreme Court's view that, unfortunately, in - - - well, in  
7 her view, there was not really a hard look at what this  
8 amelioration would really be able to accomplish?

9 MR. DAVIES: Sure. So I would say, you know,  
10 there is - - - there's about twenty pages of analysis in  
11 open space. It's 891 to 912 of the record. And the agency  
12 goes into detail. It says we're going to lose this amount  
13 of open space. And I will just point out actually, it was  
14 using a conservative analysis based on what is currently  
15 there, but the city last week prevailed in its holdover  
16 action. So you know, Elizabeth Street Garden is going to  
17 be evicted regardless, and it's - - - that's not  
18 necessarily - - - the analysis is even better for us at  
19 this point. But basically - - -

20 JUDGE RIVERA: Oh, wait a minute. Which means  
21 what?

22 MR. DAVIES: Which means that the baseline is not  
23 necessarily being - - -

24 JUDGE RIVERA: It said (indiscernible) is to  
25 seize, but what - - - what does it mean?

1 MR. DAVIES: It basically means the city is going  
2 to take the lot back over - - -

3 JUDGE RIVERA: Okay.

4 MR. DAVIES: - - - regardless. So there - - -  
5 there won't be - - - potentially, there won't be open space  
6 there as a baseline. You know, the - - -

7 JUDGE RIVERA: Doesn't matter anyway?

8 MR. DAVIES: The - - - the EIS use that as a  
9 conservative baseline, but the baseline in - - - in  
10 actuality might be zero open space versus the additional  
11 open space that the New Haven Green Project will give us.  
12 But the - - - as to the analysis, it's actually in the  
13 record, it's basically that it'll be deeded in perpetuity.  
14 There'll be regulatory agreements to enforce that it's  
15 maintained. There's community input into how the space is  
16 going to be built, what it's going to do. There's ongoing  
17 - - - there's a seven-member panel, a community advisory  
18 committee that includes open space advocates. It's going  
19 to talk about, you know, how best - - -

20 JUDGE RIVERA: I'm sorry. I was asking you just  
21 the - - - the Supreme Court's analysis.

22 MR. DAVIES: Right. What - - - what I'm saying  
23 is that that - - - that that is all of the things that  
24 offset the reduction in physical volume of open space.

25 JUDGE CANNATARO: That's the qualitative analysis



1 that was done.

2 MR. DAVIES: Correct, Your Honor.

3 JUDGE CANNATARO: With respect to the  
4 quantitative part of that, I - - - I want to propose a  
5 possible rationale for the Supreme Court's decision. Tell  
6 me if it makes any sense to you. This area is well below  
7 the aspirational benchmark for open space for the city.  
8 And I get that it's in Manhattan - - - in a very populated  
9 area of Manhattan. It's not a surprise that it's below the  
10 benchmark. But could you not argue that in an area that's  
11 so far below what - - - what is ideal that every bit of  
12 reduction of green space is all the more critical because  
13 you're dealing with an incredibly scarce resource at that  
14 point?

15 MR. DAVIES: I think it is more critical, and  
16 that's what the technical manual provides, that the - - -  
17 the thresholds are triggered at a lower level if it's  
18 already an underserved area. But that just means you have  
19 to do more analysis and weigh the quantitative reduction  
20 against the qualitative increases in - - -

21 JUDGE RIVERA: That's my point. What's the hard  
22 look on the amelioration? That's what Supreme Court said.  
23 It felt that - - - that there wasn't really an exploration  
24 - - - explanation of this amelioration, how it would really  
25 ameliorate that particular decrease.

1 MR. DAVIES: Sure. So I would say that - - -

2 JUDGE RIVERA: It can't be you're going to the  
3 Roosevelt Park. I mean, that's not going to be good  
4 enough. There's got to be something.

5 MR. DAVIES: I mean, the main thing I would say  
6 is that there is a increase in - - - essentially in the  
7 opportunity to use open space because it won't be subject  
8 to the whims of a month-to-month lease. It will be open in  
9 perpetuity. It will be open for longer hours. It'll be  
10 open year-round. So there will be - - -

11 JUDGE RIVERA: So let's say I had an open space  
12 of half a mile. That's a hypothetical. With a project,  
13 you reduce that to a quarter of a mile. The fact that the  
14 quarter of a mile is open twenty-four hours a day is what  
15 makes a difference if the half mile was only available 9 to  
16 5?

17 MR. DAVIES: I think as long as - - - what SEQRA  
18 requires is that the agency take a hard look at that trade  
19 off and make a rational determination as to whether it  
20 amounts to a significant change. As long as the agency has  
21 done that, you know, you and I might disagree about what -  
22 - -

23 JUDGE RIVERA: It's a very difficult analysis  
24 you're positing. I mean, you've lost something. You're  
25 not going to regain it. You're just trying to improve

1           whatever amount is left when the driver of the analysis is  
2           that a reduction is problematic.

3                     MR. DAVIES: Right. And I think that's why - - -

4                     JUDGE RIVERA: Any reduction is problematic. So  
5           it's very hard - - -

6                     MR. DAVIES: I think that's exactly why SEQRA  
7           consigns to the agency's discretion in the weighing of  
8           these kinds of potentially incommensurate things. It's not  
9           just a matter of which number is larger; you have to weigh  
10          - - - weigh qualitative versus quantitative effects. And  
11          that is within the agency's discretion to do. It's not for  
12          the courts or any of us to substitute our judgment for that  
13          weighing of factors the - - - the - - -

14                    JUDGE RIVERA: Is there any point where there's  
15          an aspect of judicial review on that particular issue or we  
16          always have to defer hands off?

17                    MR. DAVIES: I don't think you always have to  
18          defer. If - - - you know, if the analysis was completely  
19          irrational, if it made no sense, if it was, you know, if  
20          they say - - -

21                    JUDGE RIVERA: Well, that's what Supreme Court  
22          concluded, right? That there wasn't a rational basis.

23                    MR. DAVIES: That is what Supreme Court  
24          concluded. I think - - - respectfully, I think the Supreme  
25          Court got it wrong in the first - - - the department



1 correctly concluded that they did weigh these two factors  
2 and - - - and came to a reasoned conclusion, and that's all  
3 we need, is a reasoned elaboration of the result.

4 JUDGE RIVERA: And that reasoned conclusion is  
5 you have less but what you have is quite good?

6 MR. DAVIES: Correct. And then it's not like we  
7 - - -

8 JUDGE RIVERA: Even though, as Judge Cannataro  
9 has already pointed out, you've already said what you have  
10 is not good enough? You're already starting with this is  
11 not good enough.

12 MR. DAVIES: Right. But the analysis only  
13 measures the - - - the incremental difference between the  
14 current situation and what will happen in the future. So -  
15 - - so that's all - - - you know, that's the delta we're  
16 talking about. The fact that it's already overburdened is  
17 relevant but it doesn't change the analysis. And, you  
18 know, I think that's - - - just the weighing of those two  
19 sets of factors is well within the agency's discretion, you  
20 know. And it also considered whether or not other area  
21 parks are likely to be overburdened as a result, whether  
22 with the access to things in the area, there's a long  
23 analysis of all of the - - -

24 JUDGE RIVERA: There's only one other park,  
25 right? Or am I missing something?



1 MR. DAVIES: No, Your Honor. There's - - -  
2 there's, I - - - I think, like, twenty-one open spaces.  
3 There's a table in the middle of the - - -

4 JUDGE RIVERA: No, parks.

5 MR. DAVIES: There's Tompkins Park, and I think,  
6 Sara Roosevelt Park, along with a bunch of other open - - -  
7 smaller open spaces, playgrounds and things like that.

8 JUDGE RIVERA: Both of those parks are quite  
9 overburdened, but okay.

10 MR. DAVIES: Well, I - - -

11 JUDGE RIVERA: Go ahead.

12 MR. DAVIES: Yeah. I think that if you looked at  
13 the analysis, it - - - it goes through every park in the  
14 area, every open space in the area. It gives whether it's  
15 in good shape, how burdened it is, and, you know, talks  
16 about whether or not that that is the additional impact is  
17 likely to overburden those resources and things like that.

18 JUDGE HALLIGAN: And also, I thought a  
19 consideration of how likely it was that the particular  
20 population might impose a - - - might be imposing a  
21 significant additional burden on those already strained  
22 resources.

23 MR. DAVIES: Absolutely right, Your Honor. And  
24 it goes through and says, you know, this is low-income  
25 housing for senior citizens. They're likely to use the

1 parks at different times than the median person who's  
2 younger. They're more likely to use it during the day when  
3 people are at work, things like that. So it talks about  
4 the characteristics of the population as well. Yeah. And  
5 I urge the court take a look at the open space analysis.  
6 It's very detailed. Just one small point on the last  
7 issue, the zoning issue that's it's unripe. I think  
8 petitioners kind of give the game away in their - - - in  
9 their reply brief when they say that you don't have to  
10 defer to BSA. BSA hasn't even weighed in yet. Because the  
11 procedure is for, you know, permits to be issued, and then  
12 if there's an appeal, BSA can weigh in. So the zoning  
13 issues is unripe at this point. And unless there are any  
14 further questions, we urge the court to affirm.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. SIEGEL: A lot to say. Community  
17 participation. This court has on numerous occasions  
18 pointed out the importance of community involvement. Let  
19 me give an example. When the community later was able to  
20 go and speak at the ULURP, it's too late. It's over. They  
21 already decided on the SEQRA stuff. So that's an example.  
22 When they talk about open space, when they talk about the  
23 changes, what better - - - when you talk about seniors not  
24 going to those places, why should the developer and the  
25 lead agency decide when the seniors are going to go to

1 those places? I've been to those places, you know. And  
2 when he talks about one park, Sara Roosevelt, it's - - -  
3 it's not the kind of comparable to open space. They talk  
4 about Tompkins Square Park or Washington Square Park. Not  
5 only are they over - - - they're not in the study zone.  
6 Seniors are going to walk there twenty minutes later. It's  
7 a completely different environment.

8 JUDGE CANNATARO: Counsel, when you make that  
9 kind of argument, it almost sounds as if it's not the  
10 agency and the developer who get to decide who's going to  
11 go to that open space. It's me and my clients who get to  
12 decide who's going to go. Why should we substitute your  
13 judgment for the- - - for the people who are charged with  
14 administering SEQRA?

15 MR. SIEGEL: Take a look at Friends of P.S. 163,  
16 where they talk about it's essential and mandatory that the  
17 community be involved. I'm not talking - - - I'm using  
18 your case law over the years to develop this argument.  
19 You've said it over and over again. Let me also respond to  
20 the other questions that were being asked.

21 With regard to the idea of the greenhouse, the  
22 technical manual 18 is greenhouse and climate change.  
23 They're two different concepts. And when they talked about  
24 that they did look at greenhouse, go to page 860 of the  
25 record. It has nothing to do with climate change. When

1 they list all the factors that they took into account,  
2 greenhouse is there and climate is not there, page 862.

3 With regard to the issue - - - with regard to the  
4 greenhouse, it was all about the building. You're right.  
5 It wasn't about what's the effect of open green space when  
6 you're destroying it, and how does it coincide with trying  
7 to counter climate change. There were hypothetical posed  
8 to me about one tree versus a hundred trees. We can see,  
9 you could defer to the agency if they do a hard look but  
10 not when they do a no look, there should be no. And  
11 furthermore, on discretion - - - under discretion, it's not  
12 unlimited. I submit when they don't do climate change,  
13 it's an abuse of discretion.

14 JUDGE RIVERA: What - - - what, if any, impact -  
15 - - I know it's post - - - it's outside this record - - -

16 MR. SIEGEL: I'm sorry?

17 JUDGE RIVERA: - - - but since you mentioned it.  
18 What - - - what, if any, relevance does the result of the  
19 holdover proceeding have?

20 MR. SIEGEL: It's irrelevant. They're separate  
21 and distinct. An appeal has already been filed. There's a  
22 stay until September 10th. There's lots of creative legal  
23 options to deal with the housing courts in New York City.  
24 It's irrelevant. We're separate and distinct. We have  
25 enough co-appellants that - - - Renee Green, who lives

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there, under Plastics, under Save the Bush, she meets every one of those criterias. If every one of our plaintiffs - - - appellants disappeared, I thought, she's there, ninety-two-year-old woman, wonderful. I talked to her today. She goes there at least once a week even though - - -

CHIEF JUDGE WILSON: Thank you, Counsel. Your time is up.

MR. SIEGEL: I appreciate coming here, especially after going to the Appellate Division. And you'll do more than their four-page decision. Thank you very much.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Elizabeth Street Garden v. City of New York, No. 60 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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